

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of) MM Docket No. 94-76
) MM Docket No. 94-77
Amendment of Section 73.202(b),) MM Docket No. 94-51
Table of Allotments,) RM-8470
FM Broadcast Stations.) RM-8477
(Chester, Shasta Lake City,) RM-8523
Alturas, McCloud, Weaverville,) RM-8524
and Shingletown, California.)) RM-8591

TO: Commissioners, Federal Communications Commission.

APPLICATION FOR REVIEW.

m. JAYNE sawyer ("sawyer"), d/b/a m. JAYNE enterprises, hereby submits this APPLICATION FOR REVIEW to the Commissioners of the Federal Communications Commission ("FCC") of the Action taken by the Delegated Authority ("DA"), the Chief, Policy and Rules Division in the MEMORANDUM OPINION AND ORDER ("MO&O") DA 98-788, adopted 15 April 1998, and released 24 April 1998.

The MO&O DENIED sawyer's PETITIONS FOR RECONSIDERATION of the Report and Order ("R&O") in MM Docket Nos. 94-76 and 94-77, 11 FCC Rcd 5288 (1996) ("R&O I"), and the R&O in MM Docket No. 95-51, 11 FCC Rcd 8672 (1996) ("R&O II").

sawyer submits this APPLICATION FOR REVIEW pursuant to Section 1.115 (a) of the FCC Rules and Regulations. To Wit, the Action taken by the DA is the result of prejudicial procedural error (1.115 (b)(2)(v)), and is in conflict with established Commission policy (1.115 (b)(2)(i)).

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PRELIMINARY MATTERS.

First and foremost, sawyer wishes to incorporate by reference the PETITIONS FOR RECONSIDERATION OF R&O I AND R&O II into this APPLICATION FOR REVIEW. For the Record, sawyer reaffirms the information and data contained in those Pleadings.

Secondly, for the Record, sawyer emphasizes the finding contained in the MO&O that **no party filed an OPPOSITION to sawyer's PETITIONS FOR RECONSIDERATION OF R&O I AND R&O II**. Not any party who had standing to file such an OPPOSITION, nor any other interested party in response to the Public Notice of the filing of the PETITIONS FOR RECONSIDERATION, Report No. 2150, given 30 August 1996. This is an important and decisive fact, and sawyer takes this opportunity to illuminate this actuality, as it will be pivotal when considering this APPLICATION FOR REVIEW.

Finally, sawyer requests that the FCC withhold any action on any pending APPLICATION(S) FOR FM CONSTRUCTION PERMIT(S) for any FM Channels Allotted via R&O I and R&O II, until the Final Disposition of the instant APPLICATION FOR REVIEW. Granting any of these pending Applications could be Prejudicial to sawyer, as there is no Commission policy of reimbursement to affected displaced Applicants with respect to Channel Allotments. Only Licensees and Permittees are entitled to reimbursement. (Glenden Beach, Sweet Home and Toledo, Oregon, 4 FCC Rcd 7796 (1989)).

ACTION OF DELEGATED AUTHORITY WITH RESPECT TO THE PETITION FOR
RECONSIDERATION OF R&O I.

In the MO&O, the DA DENIED sawyer's PETITION FOR
RECONSIDERATION OF R&O I based upon the following:

1. The Channel Allotted via R&O I, Channel 259A, is "equivalent" to the Channel requested by sawyer via MM Docket No. 94-76, Channel 296A.
2. Displacement or interference to FM Translator stations is irrelevant because they are secondary services.
3. Allotment of Channel 259A allowed for new FM Allotments for five communities.
4. sawyer filed an Application for Channel 259A at Chester.

At first glance, it would appear that the DA has put forth a strong and defensible case for DENIAL of sawyer's PETITION FOR RECONSIDERATION OF R&O I. Not so. There are two fundamental issues that the DA failed to recognize while considering sawyer's PETITION, which refute items No. 1 and 2 above. Items No. 3 and 4 above are "non-issues", and will be dealt with summarily. Before discussing the two fundamental issues cited above, sawyer is compelled to correct the Record in the MO&O, as to several of errors in Footnote No. 2 of that document. Rather than enumerate all the errors contained therein, sawyer directs the Commissioners to a careful reading of sawyer's alternate Allotment plan detailed in sawyer's PETITION FOR RECONSIDERATION.

ISSUE No. 1: As cited by sawyer in "Preliminary Matters" above, **no party filed any OPPOSITION to sawyer's PETITION FOR RECONSIDERATION OF R&O I.** Therefore, the DA should afforded sawyer's PETITION the status of late-filed REPLY COMMENTS to the consolidated counterproposal (RM-8523) filed by Goldrush Broadcasting ("Goldrush"). As such, the DA should have examined sawyer's alternate Allotment plan vis-a-vis Goldrush's counterproposal. Having done so, the DA would have found that not only does sawyer's Allotment plan provide for new FM Allotments at the five communities contained in Goldrush's counterproposal (so much for item No. 3 above), but is superior in that sawyer's Allotment plan proposes the Allotment of FM Channel 241C2 to the community of Shasta Lake City, California versus the Allotment of FM Channel 296C3, as contemplated by Goldrush's counterproposal. This Allotment would provide Shasta Lake City and the surrounding areas with enhanced FM service, and is clearly consistent with the Commission's policy to Allot the highest Class Channel available to a community. The MO&O at Footnote No. 5 claims the proposed higher Class Allotment at Shasta Lake City to be one the "deficiencies" of sawyer's Allotment plan, claiming that "no interest" has been expressed in a higher Class Allotment. Not only does this statement contravene Commission policy, but it is unlikely any potential Applicant would prefer a lower Class Allotment. However, given that unlikely situation, an Applicant would be free to "downgrade" once a Construction Permit was Granted, if indeed that was the Applicant's desire. As for the other "deficiency"

cited in the MO&O at Footnote No. 5 (a lower Class Allotment for Alturas, California) a careful reading of sawyer's alternate Allotment plan, reveals that proposal to be one of several "options" for Alturas proffered by sawyer in order to give the Commission latitude in arriving at an Allotment decision for that community.

ISSUE No. 2: In sawyer's PETITION FOR RECONSIDERATION OF R&O I , sawyer stated that the Allotment of FM Channel 296A to Chester, California was **preferable** to the Allotment of FM Channel 259A, as proposed by Goldrush. " It is the Commission's policy to consider whichever Allotment plan it believes to be more conducive to serving the public interest." (Emphasis added. Pueblo, Pueblo West, Canon City and Calhan, Colorado 13 FCC Rcd 694 (1998)). The DA in the MO&O did not consider nor enumerate any "public interest" factors when arriving at the decision to retain the Allotment of FM Channel 259A. Section 307 (b) of the Communications Act provides for the "fair, efficient, and equitable distribution of radio service". sawyer in the PETITION FOR RECONSIDERATION presented and attested to the veracity of the "empirical data" she gathered concerning the number of signals in use in the Chester, California in the band of frequencies of 98-101 MHZ. sawyer indicated that listening tests revealed that these signals, for whatever engineering/technical reasons, interfere with each other depending on the location of an FM receiver in the Chester area. Furthermore, that is the reason sawyer selected and proposed the Allocation of FM Channel 296A to Chester via her Petition

for Rulemaking which resulted MM Docket No. 94-76. This data clearly constitutes a "public interest" factor when considering the Allotment of FM Channel 296A versus the Allotment of FM Channel 259A. The Allotment of FM Channel 259A to Chester, when FM Channel 296A has been specifically requested and can be accomplished via sawyer's alternate Allotment plan, does not represent "fair, efficient, and equitable distribution of radio services" as contemplated by the Communications Act.

In BC Docket No. 80-130, Revision of FM Assignment Policies and Procedures, one of the Commission's objectives was the "Provision of as many program choices to as many listeners as possible". (BC Docket No. 80-130, 90 FCC Rcd 2d, 89). The Allotment of FM Channel 259A will displace FM Translator K259 AR at Chester, California. This represents a loss of one "program service" while gaining another. However, the Allotment of FM Channel 296A would not displace this existing "program service", and would add one additional "program service" to Chester, consistent with the Commission's objectives. This "public interest" factor should also be considered when comparing the Allotment of FM Channel 296A versus the Allotment of FM Channel 259A.

These two important ISSUES: prejudicial procedural error by the DA, and failure by the DA to consider "public interest" factors when considering the Allotment of an FM Channel to Chester, California, rebut and refute items No. 1 and 2 cited above, regarding the DA's DENIAL of sawyer's PETITION FOR RECONSIDERATION OF R&O I.

Finally, in regards to item No. 4 above, sawyer's Application for FM Channel 259A at Chester. sawyer, while interested in providing service to Chester, had decided she would not apply for FM Channel 259A, given the congestion of signals as enumerated in the PETITION FOR RECONSIDERATION. The MO&O is silent as to the fact that sawyer did not tender an Application during the FM Window for Channel 259A, 17 June-18 July, 1996. **No other party filed an Application during the FM Window either**, perhaps due to the signal congestion in the Chester area. Only after sawyer called the FM Branch of the FCC concerning her PETITION FOR RECONSIDERATION, and was told that it would not be acted upon for "a long, long time" (23 months, as it turned out), did sawyer decide to apply for Channel 259A in order to preserve some right to use FM Channel 296A, if the Commission accepted her alternate Allotment plan as outlined in her PETITION FOR RECONSIDERATION. sawyer notes for the Record, that despite filing the consolidated counterproposal to MM Dockets Nos. 94-76 and 94-77, and pledging "its willingness and ability to apply to the Commission for construction permits at both Alturas and McCloud, California as well as Shasta Lake City", neither Goldrush Broadcasting nor it's principal, Mr. Ralph Saul, have made any Application for Construction Permits for those communities. In fact, the Allocation at Alturas, California (Channel 297C) sought by Goldrush remains a vacant, unapplied for Allotment to this day.

ACTION OF DELEGATED AUTHORITY WITH RESPECT TO THE PETITION FOR
RECONSIDERATION OF R&O II.

In the MO&O the DA DENIED sawyer's PETITION FOR
RECONSIDERATION OF R&O II based on the following:

1. The FCC properly accepted the late-filed expression of interest filed by Mark Allen ("Allen").
2. The FCC properly accepted Allen's alternative expression of interest for FM Channel 241A.
3. A party to an Allotment Rulemaking proceeding may suggest alternative, equivalent Class Channels for communities that are already part of the Allotment proceeding.

The adoption of R&O II and the subsequent DENIAL of sawyer's PETITION FOR RECONSIDERATION OF R&O II was the result of Prejudicial procedural error by the DA and is in conflict with Commission policy.

Procedural error: The DA should have been aware of sawyer's PETITION FOR RECONSIDERATION OF R&O I, including sawyer's alternate Allotment plan which proposed the Allocation of FM Channel 241C2 to Shasta Lake City, California, which was Mutually Exclusive with Allen's alternative expression of interest for FM Channel 241A, given the fact that sawyer's PETITION FOR RECONSIDERATION OF R&O I **was filed 50 days before the adoption of R&O II.** Therefore, the DA should have considered the Allotment of FM Channel 241C2 at Shasta Lake City, California vis-a-vis the Allotment of FM Channel 241A at Shingletown,

California.

Conflict with Commission policy: First and foremost, it is a matter of FCC Record that Allen has filed and prosecuted several Petitions and Applications, indicating sufficient knowledge of Commission procedures. "The Commission normally accepts late-filed comments supporting an allocation proposal, **insofar as they contain expressions of continuing interest.**" (Emphasis added. Santa Isabel, Puerto Rico and Christiansted, Virgin Islands, 2 FCC Rcd 3455 (1987)). As illuminated in sawyer's PETITION FOR RECONSIDERATION OF R&O II, the R&O II at paragraph 2 states:

"In reply comments, petitioner (Allen) **abandoned his interest in Channel 232A at Shingletown,...**"

Therefore, Allen's statement via his filing is in direct conflict with the Commission's policy regarding late-filed comments. Since no viable counterproposal was advanced at the Comment stage, and Allen **abandoned his interest** (rather than expressing a continuing interest) in FM Channel 232A, MM Docket No. 95-51 should have been DISMISSED.

Even advancing the argument that Allen's expression of interest (via Reply Comments) in FM Channel 241A at Shingletown constituted "an expression of continuing interest", the Allotment of FM Channel 241A adopted in R&O II is contrary to Commission policy. "...any substitute channel may be selected by the Commission to resolve conflicts between the initial proposal

and any timely filed counterproposal." (Emphasis added. Pinewood, SC, 5 FCC Rcd 7610 (1990)). As noted in the MO&O at paragraph 17:

"While two counterproposals had been filed in response to Notice II, proposing the allotment of Channel 232A to Shingletown, they were dismissed on engineering grounds ..."

Therefore, the Allotment of FM Channel 241A at Shingletown via R&O II is contrary to Commission policy as the two counterproposals, having been dismissed, did not conflict with the original proposal (FM Channel 232A), and the use of a "substitute" Channel (FM Channel 241A) was not warranted.

The DA should have DISMISSED MM Docket No. 95-51, and at best, issued a Notice of Proposed Rulemaking concerning the possible Allotment of FM Channel 241A to Shingletown, California. In that manner, the Notice of Proposed Rulemaking would have allowed for Comments and Reply Comments on the possible Allotment of FM Channel 241A to Shingletown by sawyer or any other interested party.

CONCLUSION.

sawyer has demonstrated in the APPLICATION FOR REVIEW that the Delegated Authority which DENIED sawyer's PETITIONS FOR RECONSIDERATION OF R&O I AND R&O II via the MO&O DA 98-778, did so on the basis of Prejudicial procedural error and in conflict with Commission policy.

In the PETITION FOR RECONSIDERATION OF R&O I, the DA should have considered sawyer's alternate Allotment plan vis-a-vis Goldrush's consolidated counterproposal. Additionally, the DA failed to consider "public interest" factors when considering the Allotment of FM Channel 296A versus FM Channel 259A at Chester, California.

In the PETITION FOR RECONSIDERATION OF R&O II the DA should have been aware that sawyer's alternate Allotment plan contained in the PETITION FOR RECONSIDERATION OF R&O I was Mutually Exclusive to the use of FM Channel 241A at Shingletown, California. Further, the DA should have either DISMISSED MM Docket No. 95-51 and issued a Notice of Proposed Rulemaking regarding the Allotment of FM Channel 241A at Shingletown, or Allotted FM Channel 232A at Shingletown as originally proposed in MM Docket No. 95-51.

sawyer requests that the Commission REVERSE the MO&O DA 98-778, and GRANT sawyer's PETITIONS FOR RECONSIDERATION OF R&O I AND R&O II in their ENTIRETY.

Finally, at this point in time, sawyer suggests two possible changes be considered with respect to the alternate Allotment

plan detailed in sawyer's PETITION FOR RECONSIDERATION OF R&O

I:

1. Allot FM Channel 241C3 to Shasta Lake City, California, rather than FM Channel 241C2.
2. Delete the vacant, unapplied for Allotment of FM Channel 297C at Alturas, California.

All statements contained in this APPLICATION FOR REVIEW are accurate and true to the best of my knowledge.

Respectfully submitted:

DATE: 19 MAY 1998

P.O. Box 1074,
Chico, CA. 95927

SIGNATURE: m. J. Sawyer
(m. JAWNE (sawyer.))

CERTIFICATION OF SERVICE.

I, m. JAYNE sawyer, do certify that a copy of the foregoing APPLICATION FOR REVIEW of Memorandum Opinion and Order DA 98-778, has been mailed to the parties listed below via first-class mail, on this 19th day of May, 1998.

Parties served:

Mr. Mark Allen
3745 McHale Way,
Redding, CA. 96001

Mr. Ralph Saul, President
Goldrush Broadcasting,
7544 Second Street,
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SIGNATURE: m. JAYNE sawyer.
(m. JAYNE sawyer.)